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IN THE

Supreme Court of the United States

DARIUSZ BISKUPSKI,

Petitioner,

v.

ATTORNEY GENERAL OF THE
UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a misdemeanor may be a felony under controlling rules of statutory construction?

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OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 508 F.3d 274 (3d Cir. 2007) and appears in Appendix A to this Petition at App. 1a-21a. The decisions by the Board of Immigration Appeals ("BIA" or the "Board") and the Immigration Judge are not officially reported and appear in Appendix B and Appendix C to this Petition at App. 22a-27a and App. 28a-38a, respectively.

JURISDICTION

The judgment entry date is February 26, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1324(a)(2)(A)

> Any person who, knowing or in reckless disregard of the fact than an alien has not received prior official authorization to come to, or enter, or reside in the United States, brings or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien, shall, for each alien in respect to whom a violation of this provision occurs . . . be fined in accordance with title 18, United Sates Code or imprisoned not more than one year, or both . . .

8 U.S.C. § 11001(a)(43)(N)

> The term "aggravated felony" means—an offense described in paragraph (1)(A) or (2) of section 274(a) [8 U.S.C. § 1324(a)(2)(A)] . . .

PRELIMINARY STATEMENT

Petitioner Dariusz Biskupski ("Petitioner" or "Mr. Biskupski") submits this petition for certiorari based upon a conflict between the decision below and this Court's precedent on statutory construction as well as an actual conflict between the circuits. Thus the Third Circuit opinion here conflicts with this Court's holdings in both *Lopez v. Gonzales*, 549 U.S. 1 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) that attention must be given to the accepted meaning of the statutory term being defined when attempting to apply that term. Similarly, the decision departs from this Court's longstanding precedent starting with *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) that deportation provisions must be narrowly construed in favor of the alien, especially since persuasive dissents from other circuits and legislative history strongly support the petitioner's position on not making a misdemeanor a felony. Likewise the decision by the Third Circuit panel also cannot be squared with this Court's rule that statutes should be construed so as to avoid internal conflicts. Finally, this case presents an actual conflict between the circuits with the position taken by the Third Circuit below at odds with the view adopted by the Fifth Circuit in *Garrido-Morato v. Gonzales*, 485 F.3d 319, 323 (5th Cir. 2007).

At issue on this petition is whether Mr. Biskupski's misdemeanor conviction, the sole criminal matter in his entire life, can be considered an aggravated felony barring him from his only remaining relief from deportation despite having lived in the United States for nearly 20 years. First, both *Lopez-Gonzales* and *Leocal* strongly support the view that Section 101(a)(43) of the Immigration & Nationality Act (the "Act"), 8 U.S.C. § 1101(a)(43) should be read as defining a subset of felonies. Second, both well reasoned dissents from other circuits and relevant legislative history confirm that, at the very least, 8 U.S.C. § 1101(a)(43) can reasonably be construed to exclude misdemeanors from being transformed into aggravated felonies. Indeed, *Garrido-Morato*, 485 F.3d at 323 even acknowledges that Congress intended the specific aggravated felony provision at issue here, Section 101(a)(43)(N), to extend only "... to all covered felonies." Given this established ambiguity, the rule of lenity or narrow construction required the issue to be resolved in Mr. Biskupski's favor, excluding misdemeanors from aggravated felony coverage. Moreover, application of this rule here finds further support in the controlling rule that statutes, where possible, should construed to avoid conflict. Since felony is already defined in 18 U.S.C. § 3559(a) to exclude misdemeanors, application of the rule of lenity or narrow construction will avoid this conflict. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

STATEMENT OF THE CASE

Mr. Biskupski was born in Poland on April 13, 1959, came to the United States on December 21, 1988 and has never left. (App. 2a). Since coming this country, he has had a history of gainful employment and has no relatives left in Poland. (App. 2a-3a, 33a). While working as a taxi driver in the New York metropolitan area in early 1994, he accepted an assignment to pick up passengers in upstate New York, for which long distance assignment he received $300. (App. 2a-3a). While driving these passengers, he was stopped by the Border Patrol, placed in deportation proceedings and charged criminally. (App. 2a-3a). He entered a guilty plea before a United States Magistrate Judge in the Northern District of New York to aiding and abetting a misdemeanor violation of 8 U.S.C. § 1324(a)(2) and was sentenced on January 31, 1994 to 30 days imprisonment and a $250 fine. (App. 2-3). At that time, Section 101(a)(42)(N) had not been added to the Act and, instead, would only become part of immigration law with the 1996 amendments. *See* Section 440(e)(3) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1276-77 (Apr. 24, 1996) ("AEDPA") and Sections 321(a)(3) and (8) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009.

During protracted deportation proceedings Mr. Biskupski applied for suspension of deportation under what was then Section 244(a) of the Act, 8 U.S.C.

§ 1254(a)(1994)[1]. His statutory eligibility for this relief, however, was rejected in a March 7, 2006 decision by the Board of Immigration Appeals ("BIA" or the "Board") holding that Mr. Biskupski's misdemeanor conviction nevertheless constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(N) and, as such, precluded him as a matter of law from ever satisfying the good moral character requirement necessary for suspension. (App. 25a). *See* 8 U.S.C. § 1101(f)(8) (aggravated felony bar to good moral character).

On September 25, 2007, a Third Circuit panel relying upon the earlier decision in *Graham v. United States*, 169 F.3d 787 (3d Cir.) (state larceny misdemeanor can be aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G)), *cert. denied*, 528 U.S. 545 (1999) and the general power of Congress to define statutory terms, held that Mr. Biskupski's misdemeanor conviction constituted an aggravated felony under the Act. (App. 10a—14a). A timely petition for rehearing with a suggestion of rehearing en banc was denied on February 26, 2008 and judgment entered that day. (App. 40a).

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1. The basic requirements for this relief were seven years physical presence and good moral character during those seven years. With that established, the alien then had to demonstrate that his deportation would cause him or his designated relatives extreme hardship. *See, e.g., INS v. Wang*, 450 U.S. 139 (1981).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the decision below conflicts with this Court's precedent on statutory construction and creates a split among the circuits. *See, e.g., Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (certiorari granted where opinion below "appears to be inconsistent with prior decisions of this Court."); Supreme Court Rule 10. (conflict among the circuits a basis for certiorari). In this connection, the Third Circuit overlooked the rule of lenity or narrow construction. This controlling rule of construction has both deep roots and modern relevance in immigration law going back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) and requires deportation provisions to be narrowly construed so as to give the alien as much protection as possible. Thus in *Tan* this Court rejected an administrative interpretation of a deportation provision, despite recognizing logical support for that view and unanimously resolved the ambiguity in the alien's favor, holding with emphasis upon the severe penalty represented by deportation:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. (citation omitted). It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, *we will not assume that Congress meant to trench on his freedom*

> *beyond that which is required by the narrowest of several possible meanings of the words used.*

(emphasis supplied). *See also Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (recognizing rule as basis for decision).; *INS v. St. Cyr*, 533 U.S. 201 (2001) (reaffirming rule); *Cardoza-Fonseca v. INS*, 480 U.S. 421, 449 (1987) (recognizes the "special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien); Moreover, the grounding of this settled rule in the harm from deportation rests upon concerns that literally date back to the founding era with no less an authority than James Madison expressly acknowledging the harsh punishment represented by deportation ". . . if a banishment of this sort be not a punishment and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison, "Report on the Alien and Sedition Acts," *Writings* at 623 (Library of America 1999, Jack N. Rakove, ed.).

Furthermore, the application of this rule in the context of deciding whether a misdemeanor can constitute an aggravated felony has been expressly recognized in well reasoned dissents, which have persuasively found Section 101(a)(43) ambiguous in including a misdemeanor within the set of aggravated felonies. *See, e.g., United States v. Pacheco*, 229 F.3d 148, 160 (2d Cir. 2000) (Straub J., dissenting); *United States v. Gonzales-Vela*, 276 F.3d 763, 767 (2001) (Merritt, J., dissenting); *Matter of Small*, 23 I & N Dec. 448, 453 (BIA 2002) (Rosenberg, J., dissenting) ("If the term 'aggravated felony' is not to be interpreted literally

based on the plain and commonly understood meaning of the two words that make up the term, then the interpretation of such an apparently ambiguous term is subject. . . ," to the rule of lenity or narrow construction.).

Furthermore, recognizing an ambiguity in the putative inclusion of misdemeanor offenses within Section 101(a)(43) of the Act, as these and other decisions do[2], has sound support in the plain language and legislative history of this provision. Indeed, *Garrido*, 485 F.3d at 323 even acknowledged that Section 101(a)(43)(N) applied only to all " covered felonies." Unlike all the other cases on the power of Congress to define terms cited by the Third Circuit panel, this case involves a term, "felony", that already has both a statutory definition (18 U.S.C. § 3559(a)) and a well recognized common law meaning. *See Lopez v. Gonzales*, 549 U.S. at 630 (in determining meaning of provision under he Act focus should be on the "term ultimately being defined," and there must be a "clear statutory command to override ordinary meaning," *Leocal*, 543 U.S. at 10 (term being defined should not be forgotten); *Alvarez-Gutierrez*, 394 F.3d at 1246 (Berzon, J., dissenting) ("*Leocal* thus underscores that courts ordinarily should interpret statutory language defining what a certain term 'means' by paying some attention to the term being defined.").

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2. *See, e.g., United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1245—1247 (9th Cir. 2005)(dissents by Berzon, J. and Reinhardt, J.); *United States v. Marin-Navarette*, 244 F.3d 1287 (11th Cir. 2001) (Cox, J., dissenting).

Under these circumstances, Section 101(a)(43) can reasonably be read a meaning that " 'aggravated felony'" defines a subset of the broader category of 'felony.'" *Pacheco*, 225 F.3d at 157 (Straub, J., dissenting). In this connection, moreover, when Section 101(a)(43) was first enacted in 1988, the crimes enumerated, murder, drug trafficking and illegal weapons trafficking, were plainly felonies, a definition Congress had no need to restate. In other words, "[w]hen Congress first codified the term 'aggravated felony,' . . . there was no need for it to define 'felony'; 'aggravated' is what needed to be given content.'" *Alvarez-Gutierrez*, 394 F.3d at 1247 (Berzon, J., dissenting). *See also United States v. Marin-Navarette*, 244 F.3d 1284, 1287 (11th Cir. 2001) (basic rule of statutory construction ". . . compels the unremarkable conclusion that by enumerating offenses under the heading 'aggravated felony' Congress described a subset of felonies . . .") (Cox, J., dissenting); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1245 (9th Cir. 2005 ("A felony is a felony, an a misdemeanor is not.") (Reinhardt, J., concurring). Indeed, the Board itself had previously reached the same conclusion in *Matter of Crammond*, 23 I & N Dec. 9 (BIA 2001) (*en banc*) ("*Crammond* I") *vacated on other grounds* 23 I & N Dec. 179 (BIA 2001) ("*Crammond* II"), a decision that was indeed vacated for reasons unrelated to the aggravated felony issue, namely the asserted lack of jurisdiction.[3]

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3. That *Crammond* I was later overruled on the merits by *Small* only serves to underscore, at the very least, an ambiguity triggering the rule of lenity.

In addition, application of the rule of lenity here finds added support in the rule that statutes should be construed to avoid conflict. *See Monsanto, supra.* Thus Congress had already defined felony to exclude misdemeanor before Section 101(a)(43) was enacted and the two statutes can be construed in harmony by applying the rule of lenity to exclude misdemeanors from the aggravated felony definition. *See, e.g., United States v. Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002) ("Congress has a longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment."); *United States v. Urias-Escobar*, 281 F.3d 165, 167 (5th Cir.) ("federal law traditionally defines a felony as a crime punishable by over one year's imprisonment") (emphasis omitted), *cert. denied*, 536 U.S. 913 (2002). Furthermore, the term "aggravated felony" is a universal whose settled characteristics, namely felony classification, should be shared by all enumerated items. *See, e.g.*, Ruggero Aldisert, *Logic for Lawyers* at 57 (1989) ("By universal, we mean that the subject term applies to all members of its class without restriction). *See Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004) and *Bobb v. Attorney General*, 458 F.3d 213 (3d Cir. 2006), both of which adopt this logical reasoning.

Moreover, just as *Lopez*, *Leocal*, *Nugent*, and *Bobb*, as well as the several cogent dissents, were handed down after *Graham*, so too does legislative history not brought to the attention of the *Graham* panel support an ambiguity triggering the rule of lenity or narrow construction. Thus the 1996 amendments to the aggravated felony definition originated in Section 161 of the Senate bill S. 1664. *See* S. 1664, 104th Cong., 2d Sees. Section 161 (1996). *See also* H.R. Conf. Rep. No. 104-828, 104th Cong., 2d Sess. 223. The Senate Report on S. 1664 succinctly stated: "Because of the expanded definition of 'aggravated felony' provided by sec. 161 of the bill, aliens who have been convicted of most *felonies*, if sentenced to at least one year in prison, will be ineligible" for relief barred by conviction of an aggravated felony. S. Rep. No. 104-249, 104th Cong., 2d Sess. 17 (1996). Similarly, Senate floor debates and comments by the major proponents of the criminal provisions strongly suggest that Congress intended the expanded definitions to be limited to felonies. Thus both Senator Spencer Abraham and Senator William Roth repeatedly referred to "felonious acts," "convicted felons" and "serious felonies" in discussing the expanded aggravated felony definitions. 142 Cong. Rec. S. 4598—4600 (May 2, 1996).

Accordingly, there was more than an ample basis for recognizing an ambiguity in Section 101(a)(43) on the issue of treating a misdemeanor as an aggravated felony. Given this ambiguity, the rule of lenity or narrow construction required the issue to be resolved in Mr. Biskupski's favor. Thus the departure from this Court's precedent on statutory construction and the conflict among the Circuits should result in a grant of certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 25, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-1887

DARIUSZ BISKUPSKI,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

Argued: June 19, 2007

Before: McKEE, FISHER, and CHAGARES, *Circuit Judges.*

(Filed: September 25, 2007)

OPINION OF THE COURT

CHAGARES, *Circuit Judge.*

This case presents an issue of first impression in this Circuit and requires us to interpret the meaning of "actions taken" in section 321(c) of the Illegal Immigration Reform and Immigrant Responsibility Act

of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009-546. For the reasons expressed below, we hold that "actions taken" refers to orders and decisions of an immigration judge (IJ) or the Board of Immigration Appeals (BIA) which apply the "aggravated felony" definitions in 8 U.S.C. § 1101(a)(43) to determine the availability of hardship relief. Because the BIA's final order denied petitioner Dariusz Biskupski relief on this basis, we conclude that the order was an "action taken" within the contemplation of section 321(c). As such, the expanded definition in 8 U.S.C. § 1101(a)(43) for aggravated felonies applied to Biskupski. Accordingly, the petition for review will be denied.

I.

In December 1988, at age twenty nine, Biskupski left his native Poland and entered the United States. His visa allowed him to remain until June 20, 1989. However, Biskupski overstayed his visa. As of January 23, 1994, Biskupski worked as a taxi driver and dispatcher for a company in Clifton, New Jersey. During his off hours, he moonlighted as a chauffeur, making trips to the local airports and occasionally to points beyond such as Washington D.C., Philadelphia, and areas within New England. He advertised his services almost exclusively within the local Polish community.

After returning home from work on or about January 22, his then-girlfriend told Biskupski she had received a call to pick up several Polish people in upstate New York and bring them to New Jersey. Biskupski and

his girlfriend departed, their destination being a gas-station/restaurant called the Bear's Den on Route 37, which is in the middle of the Akwesasne Indian Reservation bordering Canada in upstate New York. They arrived shortly after midnight on January 23 and met the intended passengers. Approximately eleven miles into the return trip, Biskupski encountered a routine Driving While Intoxicated roadblock. State police stopped Biskupski, and, after questioning him and his passengers, the police surmised that Biskupski was transporting illegal aliens. Although Biskupski maintained that he did not know his passengers had illegally entered the United States, Biskupski was arrested and charged with aiding and abetting alien smuggling, a misdemeanor violation of 8 U.S.C. § 1324(a)(2)(A). He pleaded guilty and, on January 31, 1994, he was sentenced to thirty days' imprisonment and a $250 fine.

On January 25, 1994, the Immigration and Naturalization Service (INS)[1] placed Biskupski in deportation proceedings by serving him with an Order to Show Cause (OTSC). In the OTSC, the government

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1. On March 1, 2003, Congress transferred the INS's functions to the Bureau of Immigration and Customs Enforcement (ICE) and the U.S. Customs and Immigration Service (USCIS) of the United States Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub.L. No. 107-296, §§ 441, 451 & 471, 116 Stat. 2135, 2192, 2195-97 & 2205 (codified at 6 U.S.C. §§ 251, 271 & 291); *see also Zheng v. Gonzales*, 422 F.3d 98, 103 n. 2 (3d Cir.2005) (citing *Knapik v. Ashcroft*, 384 F.3d 84, 86 n. 2 (3d Cir.2004)).

alleged that Biskupski was deportable under 8 U.S.C. § 1251(a)(1)(B) (remaining in the United States longer than permitted), 8 U.S.C. § 1251(a)(1)(C)(i) (failing to maintain or comply with the conditions of nonimmigrant status under which he was admitted), and 8 U.S.C. § 1251(a)(1)(E)(i) (knowingly assisting, aiding, or abetting another alien to enter illegally, within five years of his entry into the United States).[2] The government subsequently withdrew the allegation that Biskupski was deportable under 8 U.S.C. § 1251(a)(1)(E)(i), because the events supporting his conviction occurred more than five years after Biskupski's 1988 admission into the United States.

At an immigration hearing in Newark, New Jersey on December 19, 1996,[3] the IJ found that the government had established Biskupski's prior conviction by clear and convincing evidence. The IJ accepted Biskupski's application for suspension of deportation, but queried, in light of the passage of IIRIRA, whether Biskupski's conviction for alien smuggling would render him statutorily ineligible for suspension of deportation. The IJ heard testimony from Biskupski and his witnesses in support of his application for relief. However, the hearing was continued to permit the

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2. Section 1251 of Title 8 of the United States Code was redesignated as § 1227 by the passage of IIRIRA in 1996. IIRIRA, Pub.L. No. 104-208, § 305, 110 Stat. 3009-546, 3009-598 (1996).

3. Biskupski's case was transferred from Boston, Massachusetts to Newark, New Jersey on February 28, 1996.

parties to address the legal issue of eligibility for suspension. For reasons that are not clear, Biskupski's case was not reconvened until July 25, 2000. The proceedings were again continued until the final hearing on August 11, 2003.

On April 20, 2005, the IJ issued a written decision, superceding a prior oral decision. The IJ ruled that Biskupski's conviction for alien smuggling rendered him ineligible for suspension of deportation and denied that application. The IJ also denied Biskupski's applications for asylum, withholding of deportation and protection under the Convention Against Torture (CAT).[4] Biskupski appealed the IJ's decision to the BIA.

On March 7, 2006, the BIA dismissed the appeal, ruling that Biskupski's prior conviction under 8 U.S.C. § 1324(a)(2)(A) barred eligibility for relief under former section 244 of the of the Immigration and Nationality Act (INA), 8 U.S.C. § 1254 (1993).[5] Under former section 244, an alien qualifies for discretionary suspension of deportation by demonstrating both physical presence

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4. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. No. 105-277, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231).

5. On appeal to the BIA, Biskupski did not raise any challenges to the denial of his applications for asylum, withholding of deportation or protection under CAT and, likewise, does not raise any such challenges to this Court.

in the United States for a continuous period of not less than seven years immediately preceding the date of application for such relief and good moral character. 8 U.S.C. § 1254(a)(1) (1993). However, an alien "who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section)" cannot demonstrate the requisite good moral character. 8 U.S.C. § 1101(f)(8). Here, the BIA found that Biskupski's conviction was for an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(N). Therefore, Biskupski could not show the good moral character necessary to be eligible for suspension of deportation. This petition for review followed.

II.

Biskupski pleaded guilty to 8 U.S.C. § 1324(a)(2), which states in pertinent part:

> Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—
>
> (A) be fined in accordance with Title 18 or imprisoned not more than one year, or both[.]

This statute has been interpreted to include transporting illegal aliens from one place to another within the United States. *See, e.g., Gavilan-Cuate v. Yetter,* 276 F.3d 418, 419 n. 1 (8th Cir.2002) (citing *Matter of Ruiz-Romero,* 22 I & N Dec. 486 (BIA 1999)).

When Congress added the "aggravated felony" provision to the INA, Pub.L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537) with the enactment of the Anti-Drug Abuse Act of 1988, Pub L. No. 100-690, § 7347, 102 Stat. 4181, 4471 (1988), the statutory definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43) did not include offenses under 8 U.S.C. § 1324(a)(1)(A) or (2). In 1994, when the INS commenced deportation proceedings against Biskupski, his crime of conviction was still not among those constituting an "aggravated felony" within the meaning of the INA.

It was not until 1996 that Congress enacted legislation making certain changes significant to Biskupski's situation. Specifically, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in which it amended the definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43)(N) to include "an offense described in paragraph (1)(A) or (2) of section 274(a) [codified at 8 U.S.C. § 1324(a)] (relating to alien smuggling) for which the term of imprisonment is at least 5 years." AEDPA, Pub.L. No. 104-132, § 440(e)(3), 110 Stat. 1214, 1278 (1996).

Shortly thereafter, Congress enacted IIRIRA, further amending § 1101(a)(43)(N) by striking the minimum five-year term of imprisonment requirement.[6] IIRIRA, § 321(a)(8), 110 Stat. at 3009-628 (1996). Congress expressly mandated that the changes made to the term "aggravated felony" in 8 U.S.C. § 1101(a)(43) "applie [d] regardless of whether the conviction was entered *before, on, or after* the date of enactment of this paragraph." IIRIRA, § 321(b), 110 Stat. at 3009-628 (emphasis added). Congress dictated that "[t]he amendments made by this section shall apply to *actions taken* on or after the date of the enactment of this Act, regardless of when the conviction occurred." IIRIRA, § 321(c), 110 Stat. at 3009-628 (emphasis added).

The term "actions taken" is not defined anywhere in IIRIRA. Biskupski argues that the term relates to such "actions" as the initiation of deportation proceedings against him in 1994 or the submission of his application for suspension of deportation on August 16, 1996.[7] Because these "actions" occurred pre-IIRIRA,

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6. By the same amendment, Congress created an exception in the case of a first offense where the alien affirmatively demonstrated that he or she "committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child or parent. . . ." IIRIRA, § 321(a)(8), 110 Stat. at 3009-628. This exception does not apply to Biskupski.

7. We reject Biskupski's argument that the IJ in Boston made a ruling that he was eligible for suspension relief. The IJ's passing observation that Biskupski might be eligible for suspension of deportation was not an "action taken" within the meaning of section 321.

Biskupski contends that the pre-IIRIRA definitions of aggravated felony should apply, which did not encompass the crime for which he was convicted. At the other end of the temporal spectrum, the government argues that "actions taken" means final orders and decisions of the IJ or the BIA in adjudicating Biskupski's case. The government asserts that because the BIA issued its final decision on March 7, 2006, the IIRIRA amendments to the definition of aggravated felony apply to render Biskupski ineligible for suspension relief.

III.

We lack jurisdiction to review final orders of removal against an alien removable as an aggravated felon. 8 U.S.C. § 1252(a)(2)(C); *Drakes v. Zimski*, 240 F.3d 246, 247 (3d Cir.2001). We nonetheless retain jurisdiction to review questions of law, 8 U.S.C. § 1252(a)(2)(D), and we have jurisdiction to determine our jurisdiction, *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002). Whether a statute has retroactive application and issues of statutory construction are questions of law over which we exercise plenary review. *See Park v. Attorney General*, 472 F.3d 66, 70-71 (3d Cir.2006).

Appendix A

A.

Before turning to the issue of retroactivity, we will address Biskupski's argument that his conviction for a federal misdemeanor was a crime insufficiently serious to be considered an "aggravated felony" in this context.[8] *See* Pet. Reply Br. at 13. According to Biskupski, the word "felony" has one defining characteristic, namely an offense subject to a sentence of one year or more, *see United States v. Graham*, 169 F.3d 787, 792 (3d Cir.1999) ("[U]nder federal law, a felony is defined as a crime that has a maximum term of more than one year."), which should be held to inhere in every aggravated felony provision in § 1101(a)(43) unless Congress evinces a contrary intent. Biskupski argues that Congress's removal of the five-year sentence requirement from § 1101(a)(43)(N) by IIRIRA demonstrates its intent to "fall [ ] back . . . on the general requirement that an 'aggravated felony' be a felony." Pet. Reply Br. at 15.

Biskupski points to *Lopez v. Gonzales*, __ U.S. __, 127 S.Ct. 625, 166 L.Ed.2d 462 (2006), for the proposition that interpreting misdemeanor to mean felony is "just what the English language tells us not to expect," *id.* at 630, so Biskupski's misdemeanor conviction should not be held to constitute an aggravated felony. The government responds that where Congress defines a

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8. We find no merit to Biskupski's waiver and law of the case arguments. Biskupski withdrew his argument that the present aggravated felony definition does not include aiding and abetting offenses. Letter from Thomas E. Moseley, Esq. to Marcia Waldron, Clerk of the Court (April 25, 2007).

term of art like "aggravated felony" to mean something particular, as here—alien smuggling defined by 8 U.S.C. § 1324(a)(2)—then alien smuggling is an aggravated felony, even if technically only a misdemeanor under federal law. *Compare* 18 U.S.C. § 3559(a)(6) (classifying an offense with a maximum term of imprisonment of one year or less but more than six months as a Class A misdemeanor) *with* 8 U.S.C. § 1324(a)(2)(A) (providing a maximum of one year imprisonment).[9]

Our analysis begins with the statutory text. If the text of the statute is plain and unambiguous, then our analysis also ends there. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). This is so because our role "is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' " *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)).

In this case, we are called upon to analyze whether the definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43)(N) includes the federal misdemeanor

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Biskupski committed. If, as here, "a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000); *see also Meese v. Keene*, 481 U.S. 465, 484, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (recognizing "the respect we normally owe to the Legislature's power to define the terms that it uses in legislation"); *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201, 69 S.Ct. 503, 93 L.Ed. 611 (1949) ("Statutory definitions control the meaning of statutory words. . . ."). Where a definition informs what a particular term "means," that definition will include whatever express meanings follow. *See Colautti v. Franklin*, 439 U.S. 379, 392 n. 10, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.") (quotation marks and citation omitted) (alterations in original), *overruled in part on other grounds by Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989).

By placing the term "aggravated felony" in quotations followed by "means" Congress made absolutely clear that "aggravated felony" is a term of art defined by the subsections that follow. We must apply the definition of that term provided by Congress. Congress plainly and unambiguously included the offenses described in 8 U.S.C. § 1324(a)(1)(A) and (2) as part of the definition of "aggravated felony" in § 1101(a)(43)(N). Accordingly, we reject Biskupski's argument that Congress meant to "fall back" to the time-

honored, one-year distinction between felonies and misdemeanors. It is neither our task nor our prerogative to rewrite the definition that Congress provided, especially considering the traditional deference we accord to Congress when it legislates in the area of immigration. *See Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir.2005). Our holding today is consistent with our decision in *United States v. Graham*, *supra*, which applied the § 1101(a)(43) definition of "aggravated felony" as incorporated into the sentencing guidelines, *see* U.S.S.G. § 2L1.2(b)(1)(B), to determine increases to base offense levels in the sentencing context. In *Graham*, the Court considered "whether a misdemeanor can be an 'aggravated felony' under a provision of federal law even if it is not, technically speaking, a felony at all." 169 F.3d at 788. We answered that question in the affirmative and determined that a misdemeanor theft could be an aggravated felony under 8 U.S.C. § 1101(a)(43)(G).[10]

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10. Other courts of appeals have followed this Court's lead in determining that certain misdemeanors may constitute aggravated felonies under the definition set forth in § 1101(a)(43). *See, e.g., United States v. Cordoza-Estrada*, 385 F.3d 56 (1 st Cir.2004) (per curiam) (misdemeanor assault); *United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir.2002) (misdemeanor battery); *United States v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir.2002) (misdemeanor child abuse); *United States v. Urias-Escobar*, 281 F.3d 165 (5th Cir.2002) (misdemeanor assault); *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir.2001) (misdemeanor sexual abuse of a minor); *United States v. Christopher*, 239 F.3d 1191 (11th Cir.2001) (misdemeanor theft offense); *United States v. Pacheco*, 225 F.3d 148 (2d Cir.2000) (misdemeanor domestic assault, theft); *Wireko v. Reno*, 211 F.3d 833 (4th Cir.2000) (misdemeanor sexual battery).

In sum, we hold that Biskupski's misdemeanor conviction for aiding and abetting alien smuggling under 8 U.S.C. § 1324(a)(2) constitutes an "aggravated felony," as that term is defined in 8 U.S.C. § 1101(a)(43)(N).

B.

We turn now to the issue of retroactivity and the dispute over the meaning of "actions taken" in section 321(c) of IIRIRA.

The first question in determining whether a civil statute applies retroactively is whether Congress has expressly provided for retroactive application. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Section 321(b) of IIRIRA is a clear expression of Congress's intent to apply the definition of "aggravated felony" in § 1101(a)(43)(N) retroactively. *See INS v. St. Cyr*, 533 U.S. 289, 318-19, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); *accord Garrido-Morato v. Gonzales*, 485 F.3d 319, 323 (5th Cir.2007); *Mohammed v. Ashcroft*, 261 F.3d 1244, 1250 (11th Cir.2001). Just as clearly, section 321(c) limits the applicability of the new definitions of aggravated felony to "actions taken" on or after September 30, 1996. The focus of section 321(c) is prospective, not retrospective. Biskupski argues on appeal that although the definition of "aggravated felony" may apply retroactively to his 1994 conviction, the crucial issue is whether the language "actions taken" in section 321(c) should be interpreted with a look backwards to preclude the application of the changes effected by IIRIRA to cases, like his, that commenced pre-IIRIRA.

Although we have not yet addressed the meaning of the phrase "actions taken," several of our sister circuits have examined the issue. Indeed, an argument similar to Biskupski's was raised in *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir.1997). The Court of Appeals for the Ninth Circuit described the issue as follows:

> [W]hile it is clear that it doesn't matter when the conviction occurred if the IIRIRA "aggravated felony" amendments apply, it is not clear that those amendments apply. It is clear enough that they apply to "actions taken" after September 30, 1996, but neither the text nor the legislative history defines the "actions" that, if "taken," trigger the applicability of IIRIRA § 321.

Id. at 856. In *Valderrama-Fonseca*, the alien was convicted of burglary in 1985. *Id.* at 854. The INS initiated deportation proceedings in October 1989. *Id.* at 855. In 1992, the IJ determined that Valderrama was deportable for having been convicted of a crime of moral turpitude and denied his request for discretionary relief from deportation. *Id.* Valderrama appealed to the BIA, which affirmed the IJ's decision in June 1995. *Id.*

Prior to oral argument, AEDPA and IIRIRA took effect, barring judicial review of final orders of deportation against aggravated felons. The question before the court of appeals was whether the IIRIRA "aggravated felony" amendments were applicable to

Valderrama's case. The answer turned, as it does here, on the meaning of the phrase "actions taken" in section 321(c).

The *Valderrama-Fonseca* court examined three possible meanings of "actions taken" that could potentially trigger the applicability of section 321:

> One is to say that "actions taken" refers to orders and decisions issued against an alien by the Attorney General acting through the BIA or Immigration Judge. This makes logical and practical sense, as "actions taken" is easily understood to encompass things done by an agency to an alien.... Another possibility is that "actions taken" refers to steps by the alien, such as applying for discretionary relief or petitioning for review of the BIA's decision. . . . A third possibility is the INS's preferred construct that "actions taken" means any action by anyone, including this court. While the suggestion is not untenable, as courts do act, it seems implausible; it would mean that our jurisdiction would depend on when we got around to hearing a particular petition and to taking the action that would be an "action taken" within the meaning of § 321(c).

Id. at 856.

Ultimately, the Court of Appeals for the Ninth Circuit applied the first definition—that the phrase "actions taken" refers to orders and decisions of the IJ

and BIA. Because the decisions of the IJ and the BIA pre-dated September 30, 1996, the effective date of IIRIRA, the court concluded that "the gateway to IIRIRA's aggravated felony amendments ha[d] not been opened." *Id.* at 857; *see also Xiong v. INS,* 173 F.3d 601, 607 (7th Cir.1999) (applying the same definition of "actions taken" and holding that "the BIA's dismissal of Xiong's appeal on August 21, 1999 was an action taken that triggered the new definition of 'aggravated felony' "); *Choeum v. INS,* 129 F.3d 29, 37 (1st Cir.1997) ("The first definition is the strongest and most sensible: that 'actions taken' refers to actions and decisions of the Attorney General.").

In *Garrido-Morato v. Gonzales,* 485 F.3d 319 (5th Cir.2007), the INS commenced deportation proceedings in March 1996 against Garrido-Morato, a native Mexican who entered the United States in 1986, charging her with overstaying her 72-hour visitor visa. *Id.* at 320-21. The following events took place prior to the enactment of IIRIRA: Garrido-Morato pled guilty to one count of harboring aliens; a judgment of conviction was entered against her; and she was sentenced to three years of probation. *Id.* at 321. On September 10, 1996, she applied for suspension of deportation under section 244 of the INA. *Id.* As in Biskupski's case, her actions of pleading guilty and filing for relief from deportation predated the enactment of IIRIRA on September 30, 1996.

The crux of Garrido-Morato's argument, like Biskupski's, was whether section 321(c) of IIRIRA applied to bar her eligibility for suspension of

deportation or whether application of section 321 was impermissibly retroactive. *See id.* at 323 ("The most favorable argument to be made is that § 321(c) is the effective date provision for the entire section: § 321(c) states to what and when the statute itself (not merely its definitions) is to be applied; the statute is to be applied to (1) 'actions' that are 'taken' (2) on and after the date of enactment."). After reviewing the possible meanings of "actions taken," the Court of Appeals for the Fifth Circuit applied the definition espoused in *Valderrama-Fonseca*, specifically rejecting Garrido-Morato's position that "actions taken" refers to the actions she took in pleading guilty and applying for hardship relief. The court stated, in pertinent part:

> Although "actions taken" may be more inclusive, we fully agree that the term includes actions and decisions of the Attorney General acting through an immigration judge or the BIA. But it is also clear to us that "actions taken" are actions taken *under* the statute. Indeed, "actions taken" must refer only to such actions taken under the statute because § 321(c) is an effective date provision for § 321 and it thus only speaks to "actions" that are "taken" under that section, such as determining the meaning of "aggravated felony" and thus the availability of discretionary hardship relief to such felons. It does not speak to "actions" that are not taken pursuant to the statute.

Id. at 324 (quotation marks and citation omitted). The IJ denied Garrido-Morato's hardship relief in March

1997. "[B]ecause that ruling, i.e., 'action taken,' occurred after September 30, 1996, § 321(c) compelled the IJ to utilize the retroactive definition and find Garrido's conviction to be an aggravated felony." *Id.*

In *Tran v. Gonzales*, 447 F.3d 937 (6th Cir.2006), the Court of Appeals for the Sixth Circuit reached a different interpretation of section 321(c). The *Tran* court reasoned:

> Section 321(c) explicitly limits the application of the revised definition of "aggravated felony" to *proceedings initiated* after September 30, 1996. Section 321(c) is a restriction on Section 321(b). As the agency itself has held, even though § 321(b) established that the revised definition of an aggravated felony can encompass any conviction regardless of when it occurred, "Section 321(c) . . . limit[s] the definition . . . by stating that the amendments will apply only to 'actions taken' after the date of the IIRIRA's enactment, September 30, 1996." *Matter of Truong*, 22 I. & N. Dec. 1090, 1096 (BIA 1999). We need not go through a lengthy statutory analysis to conclude that § 321(c) is not retroactive since the language of the section speaks for itself. Section 321(c) explicitly limits the expanded definition of "aggravated felony" to prospective deportation proceedings. The problem with Tran's position is that this proceeding began

> in December 2000, well after § 321(c)'s temporal limitation.

Id. at 941 (emphasis added) (alterations in original). Biskupski's deportation proceedings were initiated in January 1994, well before the changes effected by IIRIRA. Understandably, Biskupski relies heavily on *Tran.*

The *Tran* court eschewed critical analysis of the meaning of the phrase "actions taken," instead substituting in its place the phrase "proceedings initiated." We can find no support for this interpretation either in case law or statutory text. Even the case cited for support, *Matter of Truong, supra,* applied the *Valderrama-Fonseca* definition of "actions taken." Accordingly, we decline to follow *Tran.*

We adopt the definition of "actions taken" articulated by the *Garrido-Morato* court. Specifically, the definition of "aggravated felony," as amended by AEDPA § 440(e) and IIRIRA § 321(a), is applicable to "actions taken," which we hold to mean orders or decisions of the IJ or BIA which apply the "aggravated felony" definitions and thus determine the availability of discretionary hardship relief to such felons. This definition of "actions taken" makes sense considering that until a final agency order is issued by either an IJ or the BIA, an alien remains the subject of administrative adjudication "and has . . . not established any right to the benefit he is seeking to obtain by his application." *Ortiz v. INS,* 179 F.3d 1148, 1156 (9th

Cir.1999) (quotation marks omitted). In the present case, the BIA determined that Biskupski was ineligible for suspension of deportation as an aggravated felon on March 7, 2006, well after the IIRIRA amendments took effect. The BIA must apply the law existing at the time of its review, *id.*, and we conclude that there was no impermissible retroactive effect in doing so.

IV.

Because we hold that Biskupski's federal misdemeanor conviction constitutes an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43)(N) and because we conclude that the statute is not impermissibly retroactive as applied to Biskupski, we will deny the petition for review.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED MARCH 7, 2006

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73 081 356 - Newark Date: March 7, 2006

In re: DARIUSZ BISKUPSKI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thomas E. Moseley, Esquire

ON BEHALF OF DHS:
Charles Parker, Jr.
Chief Counsel

CHARGE:

Order. Sec. 241(a)(1)(E), I&N Act [8 U.S.C. § 1251(a)(1)(E)] – Smuggling

Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – In the United States in violation of law

Appendix B

Sec. 241(a)(1)(C)(i),
[8 U.S.C. § 1251(a)(1)(C)(i)]
Nonimmigrant – failed to comply with conditions of status

APPLICATION: Suspension of deportation

The respondent is a native of Poland who entered the United States in December 1988. On April 20, 2005, an Immigration Judge denied the respondent's applications for suspension of deportation, withholding of deportation, and protection under the Convention Against Torture. The sole issue on appeal is whether the respondent's 1994 misdemeanor conviction for transporting aliens into the United States without authorization under 8 U.S.C. § 1324(a)(2)(A) bars him from eligibility for suspension of deportation under former section 244 of the Immigration and Nationality Act (I.J. at 3; Exh. 4). We find that the conviction does bar eligibility for relief under former section 244 of the Act and will accordingly dismiss the appeal.

We note that the Immigration Judge did not specify the basis for his conclusion that the respondent's conviction bars him from eligibility for suspension of deportation. However, because the Immigration Judge focuses on the "smuggling" allegations and specifically declines to make any finding as to whether the respondent's conviction is a crime involving moral turpitude (I.J. at 5), it appears that the Immigration Judge's finding that the respondent is ineligible for

suspension of deportation is based upon a conclusion that the respondent lacks the good moral character necessary for suspension of deportation. *See* Tr. at 129, 155. We therefore will review whether the respondent's conviction bars him from showing the requisite good moral character necessary for the relief of suspension of deportation, or whether the respondent is otherwise barred from this relief.

To qualify for suspension of deportation under former section 244 of the Act, an alien must be "physically present in the United States for a continuous period of not less than 7 years immediately preceding the date of such application" and "prove[] that during all of such period he was and is a person of good moral character." *See* former section 244(a)(1) of the Act, 8 U.S.C. § 1254 (1993). A conviction might prevent an alien from showing the requisite good moral character through several different provisions of the Act. Among other things, the conviction could, if committed during the operative 7-year period, fall under one of the enumerated excludability-related bars to a showing of good moral character,[1] or it could be an aggravated felony, forever barring the alien from showing requisite good moral character. *See* sections 101(f)(3), (8) of the Act.

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1. In this case, the relevant excludability provisions are sections 212(a)(2) (crime involving moral turpitude) and 212(a)(6)(E) (knowingly inducing, assisting, abetting, or aiding any other alien to enter or try to enter the United Sates in violation of law) of the Act.

Appendix B

We first note that because the conviction occurred in 1994, it is outside of the 7-year period for good moral character triggered by the excludability sections referenced in section 101(f)(3) of the Act. *Matter of Castro*, 19 I&N Dec. 692 (BIA 1988); *Matter of Oriega*, 23 I&N Dec. 793 (BIA 2005). Nevertheless, the respondent still could be barred from showing good moral character if his conviction under 8 U.S.C. § 1324(a)(2)(A) is considered an aggravated felony. Section 101(a)(43)(N) of the Act defines as an aggravated felony an "offense described in paragraph (1)(A) or (2) of the section 274(a) of the Act," i.e., the same statute under which the respondent was convicted. Because Congress chose to include *all* offenses committed under subsection 1324(a)(2) in its definition of an "aggravated felony," the clear language of the statute requires us to find that the respondent's conviction is an aggravated felony. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *cf. Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999). The fact that he was convicted of a misdemeanor offense, and sentenced to 30 days incarceration, does not alter our conclusion in this regard. *See Matter of Small*, 23 I&N Dec. 448 (BIA 2002); *cf. United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (the term "aggravated felony" is a term of art that can include misdemeanors in certain circumstances). Accordingly, the respondent is barred from showing the requisite good moral character because he is an alien who has "at any time" been convicted of an aggravated felony. *See* section 101(a)(f)(8) of the Act. *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1998).

Appendix B

Turning now to the issue of whether the respondent's conviction is a crime involving moral turpitude, we note that even assuming that the respondent's crime is one in which moral turpitude inheres (which is not clear), it appears that the respondent's conviction would be subject to the "petty offense" exception to the crime involving moral turpitude provisions of the Act. The current version of the petty offense exception, codified at section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), was adopted pursuant to section 601(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (IMMACT). Under current provisions, a single crime involving moral turpitude will not provide a basis for a finding of inadmissibility if (1) the maximum penalty possible for the offense was imprisonment for 1 year or less, and (2) upon conviction, the respondent was sentenced to a term of imprisonment of 6 months or less.[2] *See* section 212(a)(2)(A)(ii)(II) of the Act. The maximum possible punishment the respondent could have received for his offense did not exceed imprisonment for 1 year. *See* 18 U.S.C. § 1324(a)(2)(A); Exh. 5. The respondent was

2. The respondent would also qualify for the petty offense exception under the prior version of that provision. The previous version of the petty offense exception provided that a single crime involving moral turpitude qualified as a petty offense so long as the "sentence actually imposed" did not exceed 6 months, regardless of the punishment that the alien *could have received* under the statute in question. *See* former section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9) (Supp. IV 1986); *Matter of Castro*, 19 I&N Dec. 692, 694 (BIA 1988). The respondent was sentenced to 30 days imprisonment. Exh. 4.

sentenced to 30 days imprisonment. Exh. 4. Therefore, even assuming that his conviction involved moral turpitude, he qualifies for the petty offense exception, thus erasing any resulting § 244(a) eligibility bars with regard to good moral character and also the "stop-time" rule set forth in section 240A(d)(1) of the Act. *See* section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act; *Matter of Nolasco*, 22 I&N Dec. 632 (BIA 1999). The respondent therefore cannot be considered to have a conviction under section 212(a)(2) of the Act. *Cf. Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003).

Accordingly, because we find that the respondent has been convicted of an aggravated felony, and as such is incapable of showing the good moral character necessary for the relief of suspension of deportation, we will dismiss the appeal.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS), and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

s/ [illegible]
FOR THE BOARD

APPENDIX C — DECISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT DATED APRIL 20, 2005

U.S. Department Of Justice
Executive Office For Immigration Review
Immigration Court
Newark, New Jersey

In Deportation Proceedings Of:

Biskupski, Dariusz
A73-081-356

Charge: Removable Pursuant To Sections 241(a)(1)(E)(i), 241(a)(1)(C)(i), 241(A)(1)(B) Of The Immigration And Nationality Act As Amended

Application: Asylum, Withholding; Voluntary Departure; Suspension Of Deportation, Convention Against Torture Pursuant To Sections 208(a), 243(h), 244(a), 244(b)(1) Of The Immigration And Nationality Act As Amended And Article 3 Of The Convention.

Department Of Homeland Security:
Bur. Immigration/Customs Enforcement
Office Of The Chief Counsel
970 Broad Street 11Th. Fl.
Newark, New Jersey 07102

Respondent:
Law Offices Of Mark S. Parry
372 Broad Street 2nd. Floor Suite 1
Bloomfield, NJ 07003

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Appearance:
Charles Parker Esq.
Chief Counsel By
Todd Witten Esq.
Assistant Chief Counsel

Appearance:
Mark S. Parry Esq.

Decision Of The Immigration Judge

Statements of Facts

The Respondent is A Native And Citizen Of Poland. He Entered The United States On December 21, 1988. He Has Remained In The United States Thereafter. The Respondent Was Placed Under Proceedings On February 28, 1998. The Respondent Testified Before Me On Several Occasions. On August 11, 2003 I Entered A Summary Decision. Since It Appears That The Findings On That Date Were Not Properly Recorded And Since Such A Long Time Has Elapsed From The Time The BIA Remanded This Matter Back To Me, I Have Decided To Address All Of The Issues In A Written Decision Instead. The BIA Should Be Aware That No Additional Testimony Nor Additional Documents Have Been Submitted To This Court Since That Time. For Obvious Reasons The Appeal Submitted By The Respondent Was Not Properly Considered By The BIA Since The Full Consideration Was Missing. Accordingly The Matter Was Remanded To Me For Appropriate Adjustments On March 31, 2004. Since I Now Have

Reviewed All Of The Transcripts, I Am In A Position To Offer My Decision.

The Respondent Was Accused With Being Deportable Pursuant To Sections 241(a)(1)(E)(i) Of The Act In That He Knowingly Abetted Another Individual Or Individuals To Enter The United States Unlawfully. In Addition The Respondent Was Charged Under Sections 241(a)(1)(B) and 241(e)(1)(C) Of The Act. The Respondent Admitted All Of The Allegations Except The Charge Of Smuggling.

The Testimony Establishes That The Respondent Was Working As A Taxi/Limousine Driver And Was Contracted To Meet An Individual Upstate New York. The Respondent Indicated That He Never Crossed The Border Into Canada And Was Not Aware That The Individual In Question Had Entered The United States Unlawfully. However The Circumstances Described During Testimony And The Evidence Submitted In Support Of The Charges Do Not Support Such Conclusion. The Terms Of The Agreement In Meeting An Individual Some Place In The Vicinity Of The Border Between The United States And Canada, The Amount Of Money Paid And The Fact That No Inquiry Whatsoever Was Made To Determine Whether The Individual In Question Was Authorized To Be Present In The United States, Taken Together, Reflect A Reasonable Suspicion That The Respondent Knew Or Should Have Known That He Could Reasonably Be Assisting Or Abetting A Person To Enter The United States Unlawfully.

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The Charge, If Sustained By Me Is Significant, Since The Respondent Has Never Been A Lawful Permanent Resident And The Law Allows Only One Avenue Of Relief In Order To Counter Such A Charge. The Law As Amended, Provides That If The Respondent Can Establish A Particular Degree Of Kinship With The Person He Is Trying To Smuggle, The Respondent Is Not Removable Or Deportable. This Relationship Is Missing In The Case At Bar. The Only Other Possible Waiver Is An Application For Relief Under Section 212(c) Of The Act. However, The Respondent Is Ineligible For Relief Under Section 212(c) Since He Has Never Been A Lawful Permanent Resident. The Court Finds, Therefore, That The Respondent Is Deportable As Charged On All Counts Or Charges.

The Respondent, However, Is Not Totally Devoid Of Relief. He Interposed An Application For Asylum And For The Withholding Of His Deportation To Poland. The Respondent's Offenses And Violations Of The Immigration Law Do Not Constitute The Elements Of A Particularly Serious Crime. He Would Be, In Addition, Eligible To Apply For Asylum Provided His Application Had Been Filed Within One Year From April 1, 1996, Which, The Record Establishes, He Did Not Do. However, The Respondent's Application For Asylum Can Be Interpreted As An Application For The Withholding Of His Deportation And For Protection Under Article 3 Of The Convention. The Record Also Demonstrates That The Respondent Apparently Pursued, To No Avail. An Application For Adjustment Of Status Based On A Labor Certificate. However, It Should Be Pointed Out

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That The Offense Committed Under The Smuggling Provisions Of The Act, Makes Him Ineligible To Adjust Under Section 245 Since This Ground Of Excludability Is Not Subject To Any Other Waiver Contained In Section 212.

Therefore, The Court Finds That The Respondent Is Not Eligible For Section 245(a) Nor Is He Eligible For Relief Pursuant To Section 212(c) Of The Act. The Court Also Finds That He Is Not Eligible For Asylum, Not Because He Is Statutory Ineligible Because Of His Crime But Because He Did Not File His Application For Asylum In A Timely Fashion. (Prior To April 1, 1997) The Court Also Finds That Because Of His Crime The Respondent Is Not Eligible For The Suspension Of His Deportation Proceedings.

However, The Court Also Finds That The Respondent Is Eligible To Pursue His Application For The Withholding Of His Deportation Under Section 243(a) And Under Article Three Of The Convention As Well Since He Has Not Committed A Particularly Serious Crime.

In Support Of This Application The Respondent Testified That While In Poland He Did Have some Problems With The Authorities in That T Country. He Postulated That He Supported The Solidarity Movement, Albeit The Solidarity Movement Was Severely Attacked By The Communists Leaders At Hat Time, It Eventually Caused Significant Changes In Poland, The New Government Brought About

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Significant Democratization To Poland And Such Status Has Been Maintained To Date. The Respondent Indicated How He Decided To Support The Anti Communists Forces. He Complied With His Military Obligations In Poland. The Respondent Admitted That Between 1984 To 1988, The Year He Came To The United States, He Had No Problems In Poland. In Fact, The Respondent Has Also Accepted That After Arriving In The United States in 1988 And Up To The Moment Of His Accusations in The United States, He Never Thought Necessary To Apply For Protection From Being Deported From The United States. In Fact As Stated Before, The Respondent Was At All Times Trying To Acquire His Residence In The United States Through Other Means. The Respondent's Misfortune Of Getting Involved In The Circumstances Leading To His Arrest And Charge Are Basically The Reasons Why He Finds Himself In This Binder.

Albeit The Court Is Extremely Sympathetic To His Present Circumstances And The Fact That The Respondent Has No Known Relatives In Poland At The Present Time, It Cannot Bring Itself To Find, Remotely Speaking, Any Grounds Under Which To Support The Application For Withholding Under Either The Withholding Of Deportation Provisions And/Or Article Three Of The Convention. The Necessary Standard Is Missed By A Mile. The Respondent's Testimony And Evidence Do Not Support That His Liberty And Or Life Would Be More Likely Than Not Be In Jeopardy Or Whether For Whatever Any Other Reason He Would Be The Subject Of Torture Or Severe Mistreatment By The Polish Authorities Or Any Other Groups Acting With The Acquiescence Of The Polish Authorities.

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Statement of Law

The Respondent Bears The Evidential Burden Of Establishing An Asylum Claim. In Asylum Proceedings, The Respondent Must Establish That She Or He Has A Well Founded Fear Of Persecution Under One Of The Enumerated Grounds In The Enhanced Definition Of A Refugee Contained In The Statute. The Respondent Must Establish His Or Her Burden By Evidence That Is Probative In Nature. In Order To Establish An Asylum Claim The Respondent Must Prove That He Or She Possesses A Characteristic That The Persecutor Has Identified And That The Persecutor Has The Inclination And Ability To Persecute The Respondent Because Of That Characteristic. The Respondent's Testimony, By Itself, Could Be The Basis To Grant An Asylum Claim If His Or Her Declarations Are Credible, Coherent, Plausible And Consistent With Present Country Conditions. The Board Of Immigration Appeals Has Enunciated, However, That If Independent Evidence Is Available, It Must Be Presented. An Asylum Claim Does Not Require An Unsurmountable Amount Of Evidence, Though. The Supreme Court Of The United States Has Implied That Even A Ten Percent Chance Should Suffice. The Respondent Must Have A Subjective Fear Of Persecution But It Should Be "Translated Into A Plausible Objective Aspect As Well. An Asylum Claim Is Discretionary In Nature And The Respondent Must Also Establish That, Even If She Or He Is Statutory Eligible For It, Discretion Should Be Exercised in Her Or His Favor.

An Application For Asylum is Automatically Considered An Application For The Withholding Of Removal/

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Deportation And For Protection Under Article 3 Of The Convention Against Torture. An Application For Withholding Must Also Be Based On One Of The Five Enumerated Grounds In The Definition Of A Refugee. In This Respect, The Respondent Must Demonstrate That It Is More Likely Than Not That If She Or He Is Returned To His Country Of Origin The Persecutor Would Present A Danger To His Or Her Liberty Or Lif. Withholding Is Mandatory And Must Be Granted Once It Is Established. Contrary From Asylum However, The Quantum Of Evidence Is Greater. The Probability Should Be More Than 50% That Such An Action Is Plausible.

An Application For Convention Protection Must Establish That The Respondent Will Be Tortured Or Severely Harmed If Returned To His Country Of Origin. Albeit The Reasons To Engage In This Type Of Mistreatment Are Not Related Necessarily To The Grounds Enumerated In The Definition Of Refugee For Asylum And Withholding. It Must Relate To Actions By Officials Of The Government Or By Individuals The Government Officials Have Acquiesced In Allowing The Torturing Or Severe Mistreatment Of The Respondent. Two Levels Of Protection Can Be Dispensed. If Withholding Is To Be Considered, The Respondent Must Establish That The Ground Of Inadmissibility, Excludability Or Deportability, Does Not Amount To A Particularly Serious Crime. The Respondent Could Be Granted Deferral Of His Removal Or Deportation Even If He Or She Has Committed A Particularly Serious Crime. However, The Release Of The Respondent Is Not

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Incumbent Upon The Immigration Judge But Strictly Within The Powers Of Parole Of The District Director. A Person Granted Deferral Could Be In Detention For The Duration Of His Or Her Natural Life.

Discussion

The Respondent's Case Is Relatively Simple In Terms Of Its Facts And Applicable Statutory And Regulatory Provisions. The Respondent's Record Is Extensive And Covers Several Years. However, His Testimony Has Been Extremely Succinct. The Respondent Was Accorded Tremendous Opportunities To Try To Resolve His Criminal Issues. All Of His Attempts Have Resulted In Failures. The Respondent Is Clearly Deportable As Charged And More Importantly He Is Devoid Of Any Reliefs.

The Respondent Interposed Two Viable Applications For Relief. The Court Analyzed Both His Testimony And His Evidence. Both Of His Applications Must Be Denied. The Respondent Has Applied For Voluntary Departure. In My Original Order I Denied Voluntary Departure As Well. After Reconsidering All Of The Issues The Court Is Not Sure Whether Smuggling, Under The Circumstances Of This Case, Can Be Considered A Crime Involving Moral Turpitude.

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Order

Accordingly The Following Order Shall Be Entered:

It Is Ordered That The Respondent's Applications For Asylum, Withholding Of Deportation, Suspension Of Deportation And For Protection Under Article Three Of The Convention Be Denied.

It Is Ordered That The Respondent's Application For Voluntary Departure Be Granted As A Matter Of Law For A Period Not To Exceed 60 Days From Receipt From This Order Provided That Within Five Working Days From Receipt Of This Decision The Respondent Deposits A $1000 Bond With The Appropriate Office of The OHS.

The Respondent Is Further Reminded That If He Fails To Comply With The Above Instructions, The Privilege Of Voluntary Departure Shall Be Considered Withdrawn With Prejudice And The Respondent Shall Be Deported To Poland As Charged.

The Respondent Is Additionally Reminded That if He Is Deported From The Untied States He Will Have To Await A Period Of At Least 5 Years Before Returning To The United States Unless The Attorney General Grants The Respondent Permission To Do So Sooner.

Ordered On April 20, 2005 In Newark, New Jersey.

s/ Alberto J. Riefkohl
U.S. Immigration Judge

THIS ORDER SUPERCEDES MY ORDER DATED AUGUST 11, 2003.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 26, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1887

DARIUSZ BISKUPSKI,

Petitioner

v.

ATTORNEY GENERAL OF THE
UNITED STATES,

Respondent

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, *Circuit Judges*

The petition for rehearing filed by petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of

the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
MICHAEL A. CHAGARES
Circuit Judge

DATED: February 26, 2008